

Comments of

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before the

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Introduction

I appreciate the opportunity to submit these comments on behalf of American Target Advertising, Inc. ("ATA") with regard to the Postal Inspection Service and in particular its use of subpoenas. These comments describe ATA's certain experience with regard to the Postal Inspection Service, and we hope that these comments are helpful to the Subcommittee in its oversight responsibilities.

American Target Advertising, Inc., The Viguerie Company ("TVC") and Viguerie & Associates, Inc. ("VA") (collectively, the "Companies") are or were owned by Richard A. Viguerie. For purposes of these comments, we will refer mostly to ATA, although the comments are generally applicable to the Companies.

A well-known businessman and conservative political activist, Mr. Viguerie's central role in the launch of direct mail fundraising was named by *George Magazine* as being the 64th of the "100 Greatest Moments of the American Century." Lee Edwards, in *The Washington Times* named Mr. Viguerie one of the 13 "Conservatives of the Century." Just this month, the Direct Marketing Association of Washington presented the Sisk Award for "Direct Marketing Vision" and lifetime achievement to Mr. Viguerie and Roger Craver, whom many people consider Mr. Viguerie's counterpart on the political Left. Mr. Viguerie is currently Chairman of ATA.

ATA is a direct mail agency. ATA provides various direct mail services to nonprofit organizations, primarily organizations that engage in advocacy and education about public policy issues. ATA prepares fundraising letters for its nonprofit clients. Those letters, consistent with the language and intent of the law which created the special reduced rates for nonprofit mailings, promote the public policy positions of ATA's clients, and seek adherents to the causes for which those nonprofit organizations exist. In this regard, ATA is similar to what are now hundreds of other agencies spawned largely as a result of Mr. Viguerie's revolutionizing direct mail fundraising.

The Postal Inspection Service Unlawfully Issued
Subpoenas to ATA

I wish to bring to the attention of the Subcommittee what we believe is an illegal use of subpoenas by the Postal Inspection Service. ATA recognizes the important role that subpoenas play in enforcement of federal laws. The essence of ATA's comments, however, is that the Postal Service concocted an interpretation of the Cooperative Mailing Rule, which relates to use of the reduced nonprofit mail rates, at variance with both law and postal regulation. The Postal Inspection Service has misused subpoenas to enforce the Cooperative Mailing Rule to penalize selected mailers and to chill protected First Amendment activity. Although the matter is now pending in federal court (United States v. American Target Advertising Inc., et al., No. 00-1384, U.S. Court of Appeals for the Fourth Circuit), the case is timely with respect to the issues raised in this hearing.

In early 1998, ATA received subpoenas from the Postal Inspection Service. The subpoenas state on their face that they were issued under the authority of the Inspector General Act of 1978, 5 U.S.C. App 3, Section 6(a)(4), after the date on which the Inspection Services powers were transferred to the newly appointed Inspector General. The subpoenas state that the Postal Inspection Service was conducting an investigation relating to programs and operations of the United States Postal Service, to wit, a possible fraud against the Postal Service. One of the subpoenas seeks documents going back as far as 1980. The documents seek proprietary business records, but not the letters mailed by ATA's clients. The subpoenas seek information relating only to three of ATA's (now former) clients that engage in public policy advocacy affecting senior citizens.

Soon after receiving the subpoenas, ATA contacted the individual Postal Inspector who was conducting the investigation, and asked the Postal Inspector what was the potential fraud that was being investigated. The Postal Inspector informed ATA that the matter being investigated was a potential violation of the Cooperative Mailing Rule (hereinafter "CMR"). In subsequent meetings, phone calls and exchanges of correspondence, ATA attempted to show the Postal Inspection Service that there **could not have been** a violation of the CMR by ATA or its clients as a matter of law, and therefore the subpoenas were not lawfully issued. See the attached Exhibits 1 – 13, which is the exchange of correspondence between (i) ATA and the Postal Inspection Service, and (ii) ATA and the Department of Justice.

The CMR is a rule, developed several decades ago, that prohibits nonprofits that are authorized to mail at reduced rates to send matter of an entity other than the nonprofit organization that has been issued the permit. The CMR was created by the United States Postal Service in response to a number of nonprofits inserting the advertisements and promotions of commercial products and services in the letters mailed by nonprofit organizations. The commercial entities were persuading nonprofits to include advertisements of their own commercial products in mailings at the lower nonprofit rates. Rather than paying the higher standard bulk rates, the commercial entities benefited by

“cooperating” with nonprofit organizations. Such cooperative arrangements usually entailed the commercial entity assuming some risk of the letters being mailed if the nonprofit mailing campaign were not as successful as hoped.

As indicated in more detail below, the **only** purpose for the Postal Inspection Service’s subpoenas was to advance the Postal Service’s position regarding an alleged violation of the CMR. Because ATA’s clients mailed only their own fundraising, educational and advocacy letters, and never advertised products or services of any entity or of any kind, it became apparent to ATA that the subpoenas have not been issued for any legitimate reason or purpose.

The Postal Inspection Service Has Refused to Disclose Any
Legitimate Reason for the Investigation and Subpoenas

The following chronology is supported by Exhibits 1 – 13.

February 12, 1998. Following a meeting with the Postal Inspector, who acknowledged that the investigation was about whether there had been a violation of the CMR, ATA asked to have the Postal Inspection Service’s legal department provide ATA with the legal authority for determining what a cooperative mailing is.

February 24, 1998. ATA addresses the proper statutory basis of the CMR, and states facts demonstrating that the letters mailed by ATA’s clients could not have violated the CMR as a matter of law. ATA explains that the letters mailed were for fundraising and advocacy for the nonprofit organizations, and did not contain extraneous matter.

March 24, 1998. James J. Puchala, Inspector Attorney, responds, but does not provide the legal authority for the Cooperative Mailing Rule. Mr. Puchala merely cites one case and claims that the courts have given great deference to the Postal Service. He states as the principal point of his letter that the subpoenas were issued pursuant to the Inspector General Act, and insists that ATA must comply with the subpoenas. Mr. Puchala states that the Postal Inspector will use enforcement action rather than deal with the dispute about the legal basis of the CMR.

March 24, 1998. ATA responds by stating that the Postal Inspection Service did not address the question asked by ATA about the proper legal authority defining the CMR. ATA explains again that it believes that the Postal Inspection Service is using an improper interpretation of the CMR, although the Postal Inspector’s office has refused to put such a definition in writing to ATA. ATA reiterates its request for a written interpretation of the CMR as the Postal Inspection Service believes it to be.

April 9, 1998. In response to a phone conversation with Mr. Puchala, ATA sets forth in even more detail why the letters mailed could not have violated the CMR. ATA cites 39 U.S.C. 3626, the Domestic Mail Manual, USPS Publication 417, and portions of the Congressional Record in support of its claim that the investigation is illegal and intended to chill core First Amendment activities. ATA states that the interpretation of the CMR, which the Postal Inspection Service addressed by telephone but not in writing, constitutes an unlawful and *ultra vires* act on the part of the Postal Inspection Service. ATA also states some of the suspicious circumstances leading up the issuance of the subpoenas.

June 7, 1998. Because of the concerns ATA has about the unlawful nature of the investigation, ATA asks to review the Postal Inspector's files.

July 16, 1998. In a good faith effort to resolve matters, ATA gives partial production of materials sought by subpoena. ATA also expresses its frustration that the Postal Inspector's office still had not put in writing the definition of CMR that it was relying upon as well as other questions asked by ATA. ATA cites several United States Supreme Court cases which state that the fundraising activities of ATA's clients (and of ATA's services with respect to those letters) have the highest level of First Amendment protections.

November 9, 1998. Mr. Puchala again cites merely law applicable to enforcement of subpoenas rather than addressing the crucial underlying issues that ATA has raised. Mr. Puchala states that the merits of the case are not relevant to a subpoena enforcement proceeding. Mr. Puchala states that the matter has been referred to the Department of Justice for enforcement of the subpoenas.

The remaining exhibits are an exchange of correspondence between ATA and the Department of Justice. Exhibits 1 – 13 show in great detail that ATA advanced the proper legal bases for opposing the subpoenas. ATA first discusses the underlying substantive issue that there could not have been a violation of the CMR. ATA also addresses facts and circumstances demonstrating the clear possibility that the subpoenas were issued for unlawful reasons. Those exhibits also show a refusal on the part of, first, the Postal Inspection Service, then the Department of Justice, to deal in good faith with the underlying substantive legal issue of whether **there could have been** a violation of the CMR. The responses (or lack thereof) of the Postal Inspection Service to ATA's legitimate and compelling concerns can be summed up as follows: "We don't need a reason to issue subpoenas. We're the Postal Inspection Service. Do what we say."

The Postal Inspection Service is Attempting to
Bypass Its Congressionally-Mandated Purposes

Exhibit 14 is a memorandum filed by ATA in the subpoena enforcement action in the United States District Court for the Eastern District of Virginia. That court case relates directly to the issues we address to the Subcommittee. Exhibit 14, in total,

presents many of the legal and factual arguments demonstrating that the subpoenas were illegally issued. Of particular importance is an explanation of the legislative history of the CMR, which begins at page 10 of the memorandum.

As the legislative history shows, the reduced nonprofit rates were created, *inter alia*, for nonprofit organizations to mail their fundraising, educational and advocacy letters. Beginning in 1990, and for several years running thereafter, the Postal Service had asked Congress to eliminate the reduced nonprofit rates altogether. The Postal Service attempted, alternatively, to have the Congress eliminate the reduced nonprofit rates for nonprofit advocacy mailings. Congress chose to do neither.

The essence of the CMR, as the memorandum demonstrates, is that for-profit entities may not insert commercial matter into nonprofit letters to thereby take advantage of the reduced nonprofit rates. The Congress rejected attempts by the Postal Service to eliminate the nonprofit rates altogether and, alternatively, to eliminate the nonprofit rates for advocacy mailings by nonprofit organizations. What Congress did do, however, was to effectively incorporate the CMR into the statute governing nonprofit rates at 39 U.S.C. sections 3626(j) and (k).

What the Postal Inspection Service appears to be attempting through the issuance of its subpoenas to ATA is an "end run" around Congress. USPS Publication 417, which is not a regulation and does not have the effect of law, discusses what may constitute a cooperative mailing. One of the several criteria stated in section 5-2 of Publication 417 for determining whether a mailing is "cooperative" is who bears the risk entailed with a mailing at the reduced nonprofit rates. Those standards, however, were intended to apply to mailings in which a commercial entity inserts its own promotion in a letter mailed at nonprofit rates. This is confirmed by Mr. Harvey Altergott who, as head of the Domestic Mail Classification Division of the United States Postal Service, created the regulations governing use of nonprofit rates. It was under his supervision that the concept of "risk" was created as a standard for purposes of determining whether a mailing was cooperative.

But as Mr. Altergott stated in an expert testimony report in the ATA subpoena enforcement action, the concept of risk was not intended to be a requirement to be met in order to qualify a mailing for the nonprofit rates. Mr. Altergott confirmed that the CMR was developed to limit mailings that promoted products or services, and that the mailings of ATA's clients do not violate the CMR. Mr. Altergott also confirmed that the factors he developed, including "risk," were to be used when the outward appearance and content of a mail piece would raise a question as to whether the piece qualified for nonprofit rates. No such question would be raised where a nonprofit's own mailing did not advertise products or services.

This is why, as a matter of law, ATA and its clients could not have violated the CMR. The letters of ATA's clients are plainly for fundraising, educational and advocacy purposes. And we believe that this is undisputed. Thus, the "mail matter" qualifies for the

nonprofit rates, and no amount of documents sought by the subpoenas could show otherwise.

ATA does bear risk under some of its contracts with nonprofit organizations. Rather than a nonprofit organization itself being absolutely responsible for all of their substantial up-front costs relating to fundraising letters, ATA's contracts provide that costs will be paid solely out of funds raised under the direct mail program. This enables small, under-funded or start-up organizations to begin a mail program without having a large bank roll. The benefit to the nonprofit organization is obvious. It is a legally acceptable, indeed beneficial, arrangement for many nonprofit organizations. But the Postal Inspection Service, while refusing to acknowledge anything in writing, perceives this arrangement to be unacceptable even though the letters being mailed are perfectly consistent with the reasons why the special reduced nonprofit rates were created.

The position that the Postal Inspection Service is taking with regard to the subpoenas issued to ATA is that, regardless of the fact that no commercial advertisements have been inserted into the letters of ATA's clients, the mailing may nevertheless be cooperative because ATA bears some financial risk related to the mailings. Thus, even though the letters mailed by ATA's clients are purely fundraising, education and advocacy mailings, the Postal Inspection Service is attempting to say that those mailings are cooperative. The Postal Inspection Service is advancing an interpretation that certain fundraising and advocacy letters that do not contain commercial promotions would not qualify for the nonprofit rates. The Postal Inspection Service, therefore, is attempting to legitimize a position with regard to nonprofit fundraising and advocacy letters that the Congress has already flatly rejected. Thus, the subpoenas were issued for unlawful reasons. And despite ATA's having pointed out the legal and factual reasons why the investigation is unlawful, the Postal Inspection Service has nevertheless proceeded to enforce the subpoenas. The federal courts thus far have deferred to the Postal Service's view of its own subpoena power, but the decision enforcing the subpoenas is pending on appeal.

The Subpoenas Appear to be Motivated
by Reasons Other than Legitimate Law Enforcement

There are yet other problems with the issuance of the subpoenas. The Postal Inspection Service has acknowledged to ATA that the investigation was initiated, at least in part, at the request of former Senator David Pryor (D-Ark.). Let us preface these comments by stating that ATA recognizes that many legitimate administrative investigations are initiated by inquiries from United States senators and representatives. However, the subpoenas issued to ATA are of a different nature. On the Senate floor, Senator Pryor criticized the advocacy mailings of several of ATA's clients that engage in advocacy about issues affecting seniors. Senator Pryor at that time was one of the sponsors of legislation affecting seniors, and ATA's clients were criticizing that legislation. Also at that time, Senator Pryor was chairman of the Senate subcommittee that oversaw

postal matters. Senator Pryor, in defamatory terms, criticized Richard Viguerie and identified him with those seniors groups.

The essence of the problem is that, while ATA's clients were engaging in core speech protected by the First Amendment, an influential United States senator used the Postal Inspection Service to punish his antagonists. Such fundraising and advocacy letters are fully protected by the First Amendment. *See Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980); *Riley v. National Federation of the Blind*, 487 U.S. 781 (1988); *see also FEC v. National Conservative Political Action Committee*, 470 U.S. 480 (1985) (for the proposition that the right of association is also involved in fundraising). In light of the fact that the Postal Inspection Service is using an illegitimate interpretation of the Cooperative Mailing Rule as the basis for the investigation, such an investigation is illegal. *See, for example, SEC v. Wheeling-Pittsburgh Steel Corporation*, 648 F.2d 118 (3rd Cir. 1981), which has a similar fact pattern.

The subpoenas seek documents relating only to three of ATA's clients that engaged in public policy advocacy about seniors issues, and thus appear to be highly targeted to implement a political agenda rather than an investigation of a legitimate legal matter.

As ATA also points out in its correspondence (Exhibits 1 – 13), there appear to be other dubious reasons for the genesis of the investigation. ATA and Mr. Viguerie are high-profile actors in the arena of fundraising and public policy matters. It is no secret that Mr. Viguerie has been extremely influential, and thus has been a target of his political and ideological opponents for years. In explaining his defeat in 1984, Congressman Jerry Paterson said that [when you lose an election], "you think, . . . 'If only he hadn't had Richard Viguerie and his mass-mailing operation . . . I would have won.'" *Newsweek* once said, in the debate of potential acceptance of the Panama Canal Treat, "All you have to do is stop Viguerie."

With regard to the genesis of this investigation, neither ATA nor Mr. Viguerie is angered or surprised by verbal attacks of opponents. However, when a federal agency acts upon those criticisms by issuing subpoenas without any apparent legitimate law enforcement intentions, then those subpoenas appear to be aimed at chilling important First Amendment activities and intimidating -- even smearing -- ATA and its clients. Such actions are wrong whether the victims are conservative, liberal or of any other ideology. History has shown that enforcement agencies from time-to-time have engaged in such behavior towards outspoken or unpopular groups and individuals. It is improper and unlawful to use the color of law to deprive anyone of their constitutional rights. And given all of the factors that we have discussed, including no legitimate legal basis for the subpoenas, then ATA sadly must question the good faith of the Postal Inspection Service.

ATA supports the right of free speech, and encourages debate from all sides of the ideological spectrum free from unwarranted government intrusion. The United States Postal Service controls a significant amount of the First Amendment activity that takes

place in this country. That fact makes it especially important that the Postal Inspection Service must have legitimate legal grounds to issue subpoenas that can otherwise chill free speech and the right of association.

To make matters worse, the Postal Inspection Service has leaked its investigation to the press. One Associated Press article discussed how one Postal Inspector acknowledged that one of ATA's seniors nonprofit clients was under investigation, identifying the organization by name. More recently, a candidate for Governor of New Hampshire was criticized in a New Hampshire newspaper for accepting a contribution from Richard Viguerie whom, the article stated, has been under investigation by the Postal Service since 1993. These leaks are not only unlawful, but they cause irreparable harm to individuals, and they cause loss of support to organizations that are under the cloud of an investigation. In this regard, ATA asserts that the Postal Service has not merely acted unlawfully, but has damaged ATA and its clients as well.

Conclusion

In the course of ATA's experience with the investigation by the Postal Inspection Service, it has encountered numerous illegal and improper acts. The Postal Inspection Service is advancing an untenable interpretation of the Cooperative Mailing Rule that is clearly contrary to statutory language and congressional intent. In fact, it is advancing an agenda that was rejected by Congress.

The subpoenas issued to ATA appear intended to chill protected First Amendment activity rather than advance any legitimate enforcement of the law. ATA, whose business relies on the mail -- and which itself has been responsible for a significant, lawful and important use of the mails by nonprofit organizations -- has been unfairly and unlawfully treated. Thus, even assuming that the Postal Inspection Service has authority to issue subpoenas in pursuit of investigation related to the Cooperative Mailing Rule, its pursuit of ATA is an example of government abuse. It is a far cry from the model of treatment of all American citizens, to say nothing of good Postal Service customers. We hope that this information is helpful to the Subcommittee as it explores the issues now before it.